No. 48859-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

TOMMY LEE CROW, JR., Appellant.

Appeal from the Superior Court of Thurston County
The Honorable Carol Murphy
No. 08-1-00585-6

BRIEF OF APPELLANT TOMMY LEE CROW, JR.

JENNIFER VICKERS FREEMAN
Attorney for Tommy Lee Crow, Jr.
WSBA # 35612

Pierce County Department of Assigned Counsel
949 Market Street, Suite 334
Tacoma, WA 98402
(253) 798-6996

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. ASSIGNMENTS OF ERROR

1. The Exceptional Sentence in Count Two, For Deliberate Cruelty, Was Error.
2. The Imposition of an Exceptional Sentence, Without Stating the Reasons that an Exceptional Sentence Was Justified, Was Error.
3. The Consideration of the Facts Related to the Vacated Good Samaritan Aggravator as the Basis for the Exceptional Sentence Based on the Deliberate Cruelty Aggravator, Was Error.
4. The Imposition of a Clearly Excessive Exceptional Sentence, Was Error.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. May a sentencing court impose an exceptional sentence when the sentencing court states that an exceptional sentence is justified based on the jury's finding of deliberate cruelty, but makes no oral or written findings related to the facts that support a finding of deliberate cruelty or the reasons why the exceptional sentence is justified by deliberate cruelty?
2. May a sentencing court consider facts related to a vacated

finding of a good Samaritan aggravator as the basis for an exceptional sentence based on deliberate cruelty for a separate crime, involving a separate victim?

3. Is an exceptional sentence clearly excessive when, at a resentencing, the exceptional sentence based on deliberate cruelty is increased based on a vacated good Samaritan aggravator related to a separate crime and a separate victim and where the sentencing court adopts findings from the original sentencing court that either aggravator supported the original sentence, but ignores the original sentencing court's findings that the good Samaritan aggravator was more egregious and warranted an longer exceptional sentencing than the deliberate cruelty aggravating factor.

III. STATEMENT OF THE CASE

1. Procedural History

Tommy Lee Crow, Jr. was charged with two counts of murder in the second degree and one count of arson in the second degree. (CP 3-4). Mr. Crow was convicted and the jury found aggravating factors: that the victim in count one was acting as a good Samaritan, and that there was deliberate cruelty towards the victim in count two. (CP 12-13). Mr. Crow was given an exceptional sentence on each of the murder charges, with a

total sentence of 660 months (360 months on count one, 300 months on count two, consecutive, and 43 months on count three, concurrent). (CP 27, 29).

Mr. Crow appealed and his convictions were affirmed by this court in an unpublished opinion. *State v. Crow*, 158 Wash. App. 1002 (2010).

Later, Mr. Crow filed a personal restrain petition. This court found that there was insufficient evidence to support the good Samaritan aggravator and that the trial court improperly considered good time credits when sentencing Mr. Crow. *In re Crow*, 187 Wash. App. 414, 417, 349 P.3d 902, 904 (2015). Therefore, this court vacated Mr. Crow's sentences on both murder charges and remanded for resentencing. *Id.* This is an appeal from Mr. Crow's resentencing.

2. Facts

This court previously recited the facts as follows:

> On March 28, 2008, at a homeless campsite in Olympia, Washington, Tommy Crow, Bryan Eke, and Christopher Durga, murdered David Miller and Norman Peterson. On March 18, Miller had reported to law enforcement that he witnessed Eke and Durga assault Scott Cover on March 7. On March 27, Durga learned law enforcement had information inculpating him in Cover's assault.
>
> On March 28, the night of Miller's murder, Crow, Eke, and Durga went to Miller's campsite. Crow struck Miller in the face, and Durga put Miller in a choke hold until he was incapacitated. Durga then dragged Miller's body into the campsite fire and stood on his back.

> When Peterson arrived at Miller's camp and saw Miller's body in the fire, Crow struck Peterson in the head with a tree branch and put him in a choke hold until he was incapacitated. Crow then threw Peterson's body into the campsite fire with Miller's. A medical examiner later determined that Miller and Peterson died by strangulation.

In re Crow, 187 Wash. App. 414, 417–18, 349 P.3d 902, 904 (2015).

3. Sentencing

a. *State's Recommendation.*

At the original sentencing, the State recommended a total of 600 months. (CP 153). On count one, the State recommended the high end of 265 months, with an additional 35 months for the exceptional sentence based on the finding that Mr. Miller was acting as a good Samaritan, for a total of 300 months. (CP 153). On count two, the State recommended the high end of 220 months, plus an addition 80 months for the exception sentence based on the finding that there was deliberate cruelty towards Mr. Peterson, for a total of 300 months. (CP 153-54). The State recommended that two murder charges run consecutively to each other, as required by statute. (CP 154). The State recommended the high end of 43 months on the arson charge, concurrent to the two murder charges. (CP 154-55).

b. *Defense's Recommendation.*

Mr. Crow and his attorney made no recommendations or arguments at sentencing. (CP 183-84).

c. *Court's Sentence.*

At sentencing, the trial court spoke at length about the good Samaritan aggravator, that Mr. Miller was killed for "snitching" to police and implicating Mr. Durga in an assault. (CP 185-87). The trial court stated, "It is hard to imagine a more compelling reason to impose an exceptional sentence that the facts that I've outlined here." (CP 186). The trial court further stated, that the facts related to Mr. Miller's murder "justify the imposition of a significant exceptional sentence, and I intend to impose one here." (CP 187).

The court went on to discuss Mr. Peterson's murder and the pain that was inflicted on him prior to his death. (CP 187-89). The court stated that with regard to Mr. Peterson's death there was an extreme aggravation, and "this sentence should include an exceptional sentence such that it is above the standard range." (CP 189).

The court sentenced Mr. Crow to ten percent above the State's recommendation, after discussing that Mr. Crow would be entitled to up to ten percent off in good time, for a total of 660 months. (CP 158, 189). The court sentenced Mr. Crow on count one to the high end of 265 months

plus an addition 95 months for the exception sentence based on the good Samaritan aggravator, for a total of 360 months; on count two the high end of 220 months, plus 80 months for the exceptional sentence based on deliberate cruelty, for a total of 300 months, consecutive; and 43 months concurrent for the arson charge. (CP 189). The court noted, "I've differentiated between the amounts of time imposed for Count 1 where the aggravating factor is murder of a good [S]amaritan with that of Count 2, where the aggravating factor is the cruel additional pain imposed on Mr. Peterson. I understood [the State's] reason for suggesting that they be equal, but I chose a different path." (CP 148). The court continued, "The reason I've differentiated between the two sentences is the difference between the choice that Mr. Miller made and the choice that these perpetrators made in ending his life." (CP 190). The court then discussed how brave Mr. Miller was in going to the police in this case. (CP 190).

After discussing why the trial court imposed a longer sentence for Mr. Miller's murder, the trial court stated, "I will make the finding that the total sentence that has been imposed here would be justified by either of these aggravating circumstances in the absence of the other." (CP 191).

This court, in vacating the sentences and remanding, stated:

> Crow has also proven that this error caused him actual and substantial prejudice. Here, the good Samaritan aggravator applied only to Miller's murder. Thus, without the good

> Samaritan aggravator, the trial court could not have imposed an exceptional sentence above the standard range for Miller's murder. Assuming without deciding that the trial court would have increased the exceptional sentence for Peterson's murder to compensate for its inability to impose an exceptional sentence for Miller's murder, this would not have removed the actual and substantial prejudice Crow suffered by the increased sentence for Miller's murder. Thus, Crow has shown actual and substantial prejudice as to Miller's murder.

In re Crow, 187 Wash. App. 414, 424–25, 349 P.3d 902, 907–08 (2015).

4. Resentencing

a. *State's Recommendation.*

Mr. Crow was resentenced. (4-21-16 RP 3). At the time of resentencing, the trial judge had retired; therefore, Mr. Crow was resentenced by another judge. (4-21-16 RP 3-4).

At resentencing, the State again recommended a total sentence of 600 months. (4-21-16 RP 8). The State argued that 600 months was appropriate because the trial court had sentenced 660 months based on improperly considering that Mr. Crow would receive ten percent off for good time. (4-21-16 RP 9). Although the State acknowledge that the court should not consider the good Samaritan aggravator, the State discussed the facts related to the aggravator at length during the resentencing. (4-21-16 RP 11-13). The State recommended the high end of 265 months for count one, related to the murder of Mr. Miller.

The State then argued for the high end of 220 months, plus an exceptional sentence of 115 months, on count two, for the murder of Mr. Peterson. (4-21-16 RP 13).

At the resentencing hearing, Mr. Miller's family members testified and urged the court to not lessen Mr. Crow's sentence, even though the court could not impose an exceptional sentence with regard to Mr. Miller's murder. (4-21-16 RP 25-27, 31-38).

b. *Defense's Recommendation.*

Defense counsel argued that the court should sentence Mr. Crow to the high end of 265 months on count one, and the high end of 220 months plus an exceptional sentence of 80 months on count two for a total of 565 months. (4-21-16 RP 43-45). Defense argued that the court should remove the improper exceptional sentence on count one and leave the exceptional sentence that was originally imposed on count two, minus the additional ten percent the court added in consideration of good time. (4-21-16 RP 45). Defense counsel also asked the court to consider that the co-defendants, who testified against Mr. Crow, received 257 months and 340 months for their participation in the murders. (4-21-16 RP 41). Finally, defense counsel asked the court to not impose attorney's fees due to the length of his sentence, age, and inability to pay. (4-21-16 RP 45-46).

c. *Court's Sentence.*

The court sentenced Mr. Crow to the high end of 265 months on count one, the high end of 220 months on count two, with an exceptional sentence of 115 months for the aggravating factor of deliberate cruelty, consecutive, and 43 months on count three, concurrent, for a total of 600 months. (4-21-16 RP 50-51, CP 206-13). The court reduced the total sentence from 660 months to 600 months because the original sentencing court improperly considered that Mr. Crow would receive ten percent off for good time. (4-21-16 RP 51-52). However, the court at resentencing found that the original sentence was justified by either of the aggravating factors and that the original sentencing court would have imposed the same exceptional sentence for either of the aggravating factors; therefore, it was appropriate to increase the exceptional sentence on count two. (4-21-16 RP 52).

In making its decision, the court at resentencing discussed that the victims in this case were brave, courageous, and heroes:

> The case here has been described as "a heinous crime, unacceptable by human standards," and I believe that is true that the acts are completely unacceptable, and heinous crimes were committed by the defendants responsible for the deaths of two individuals who have been aptly described as "brave, courageous," and I will give the additional label of "heroes."

(4-21-16 RP 51). These comments relate to the facts supporting the

overturned good Samaritan aggravating factor.

I. ARGUMENT

1. The Resentencing Court Failed to State the Reasons For an Exceptional Sentence on Count Two.

If a jury finds that "[t]he defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim," the court may impose an exceptional sentence. RCW 9.94A.535(3)(a). However, before the court imposes an exceptional sentence, the court must also find that "there are substantial and compelling reasons justifying an exceptional sentence. RCW 9.94A.535; *State v. Pappas*, 176 Wash. 2d 188, 192, 289 P.3d 634, 635 (2012); *State v. Stubbs*, 170 Wash. 2d 117, 124, 240 P.3d 143, 146 (2010). "Whenever a sentence outside the standard sentence range is imposed, the court *shall* set forth the reasons for its decision in written findings of fact and conclusions of law." *Id.* (emphasis added); *see also State v. Suleiman*, 158 Wash. 2d 280, 288, 143 P.3d 795, 799 (2006).

The legal sufficiency of a [exceptional] sentence is reviewed de novo. *Pappas*, 176 Wash. 2d at 192, citing *State v. Ferguson*, 142 Wash.2d 631, 646, 15 P.3d 1271 (2001).

In this case, the resentencing court marked the box on the judgment and sentence that "[s]ubstantial and compelling reasons exist which justify

an exceptional sentence . . . ." (CP 208). The court also signed separate findings of fact and conclusions of law, which stated:

Findings of Fact Pursuant to Special Verdict Form

I. The exceptional sentence is justified by the following aggravating circumstance:

(a) The defendant's conduct during the commission of the crime manifested deliberate cruelty to the victim, Norman Peterson. RCW 9.94A.535(3)(a).

Conclusions of Law

II. There are substantial and compelling reasons to impose an exceptional sentence pursuant to RCW 9.94A.535.

(CP 215).

The court at resentencing did not make any oral or written findings specifically addressing the facts that supported a finding of deliberate cruelty. Instead, the court at resentencing relied on the original sentencing judge's findings that either aggravator would be sufficient for the total sentence, disregarding that the original sentencing judge also stated he purposefully gave a longer exceptional sentence for the good Samaritan aggravator:

> I believe that the record reflects that the one aggravating factor fully supports adding 115 months to Count 2, specifically, and I believe that that is based upon the specific findings that Judge McPhee put on the record orally and in writing that one of the aggravating factors, either one, would justify the exceptional sentence upward.

(4-21-16 RP 52). Although the original sentencing judge did state that either aggravator was sufficient to justify the exceptional sentence, the original sentencing court also made it clear in his oral findings that he found the facts related to the good Samaritan aggravator more egregious and he intentionally imposed a longer exceptional sentence on that count. In addition, the resentencing court specifically noted that the victims were heroes, referencing that Mr. Miller went to the police, and did not make any mention of the injuries that Mr. Peterson sustained that formed the basis for the deliberate cruelty aggravator.

Therefore, the resentencing court erred by not making specific findings related to why the deliberate cruelty aggravator justified an exceptional sentence. Therefore, the exceptional sentence on count two should be reversed and remanded for resentencing.

2. The Resentencing Court Improperly Considered the Facts Related to the Good Samaritan Aggravating Factor on Count One, Which Was Reversed By This Court, to Increase the Exceptional Sentence on Count Two.

The court at resentencing improperly increased the exceptional sentence on count two after the exceptional sentence in count one was vacated by this court for insufficient evidence.

When an exceptional sentence for a crime is based on more than one aggravating factor and the court explicitly states that any one of the

aggravating factors would have supported the exceptional sentence, the sentence will be affirmed on appeal when one or more aggravating factors is found to be insufficient, so long as there is at least one proper aggravating factor. *See State v. Burkins*, 94 Wash. App. 677, 683, 973 P.2d 15, 20 (1999) (exceptional sentence for murder in the first degree affirmed when two of three aggravating factors insufficient); *State v. Negrete*, 72 Wash. App. 62, 71, 863 P.2d 137, 142 (1993) (exceptional sentence for unlawful delivery of a controlled substance affirmed when two of three aggravating factors insufficient).

In *Burkins*, the defendant was convicted of one count of first-degree murder and given an exceptional sentence based on several aggravating factors. *Burkins*, 94 Wash. App. at 683. The standard range was 250-333 months; the defendant was given an exceptional sentence of 720 months based on the aggravating factors of the vulnerability of the victim, lack of remorse, and future dangerousness. *Id.* at 697-98. On appeal, the court found that there was no basis for finding the victim was vulnerable and there was not substantial evidence to support the finding of future dangerousness. *Id.* However, the court affirmed the conviction and sentence because the trial court stated each of the aggravating circumstances would have supported the exceptional sentence and, therefore, the trial court would have imposed the same sentence based

solely on lack of remorse. *Id.* at 700.

This case is different in that there were not two bases for an exceptional sentence for the same crime, there were two separate crimes, with two separate victims, and two different bases for the exceptional sentences. The facts related to Mr. Miller reporting a crime to police and the facts related to the injuries Mr. Peterson sustained prior to his death are completely separate and unrelated. However, the original sentencing court relied heavy and appeared to give more weight to the good Samaritan aggravator on count one than the deliberate cruelty aggravator on count two. In fact, the original sentencing court stated, "I've differentiated between the amount of time imposed for Count 1 where the aggravating factor is murder of a good [S]amaritan with that of Count 2, where the aggravating factor is the cruel additional pain imposed on Mr. Peterson. I understood [the State's] reason for suggesting that they be equal, but I chose a different path." (CP 148). The court continued, "The reason I've differentiated between the two sentences is the difference between the choice that Mr. Miller made and the choice that these perpetrators made in ending his life." (CP 190).

At the resentencing, the court spoke about the facts that supported the good Samaritan aggravator, and heard from family of Mr. Miller, who urged the court not to reduce Mr. Crow's sentence.

At sentencing, the court commented that the victims were "heroes":

> I believe that is true that the acts are completely unacceptable, and heinous crimes were committed by the defendants responsible for the deaths of two individuals who have been aptly described as "brave, courageous," and I will give the additional label of "heroes."

(4-21-16 RP 51).

The court stated that the record and prior findings support an exceptional sentence on count two:

> I believe that the record reflects that the one aggravating factor fully supports adding 115 months to Count 2, specifically, and I believe that that is based upon the specific findings that Judge McPhee put on the record orally and in writing that one of the aggravating factors, either one, would justify the exceptional sentence upward.

(4-21-16 RP 52).

However, the resentencing court never discussed Mr. Peterson's injuries, which formed the basis for the deliberate cruelty aggravator on count two and the court never stated the reasons why an exceptional sentence was justified on count two. The resentencing court also never discussed the original sentencing court's differentiation between the severity of the aggravator on counts one and two and that the original sentencing court purposefully imposed a longer exceptional sentence for the good Samaritan aggravator.

Therefore, it is clear from the record that the resentencing court improperly considered basis for the good Samaritan aggravator as a basis for the exceptional sentence on count two. While it may be proper to consider multiple aggravating factors in concert when they apply to the same victim and same crime, a court should not be allowed to substitute or aggregate aggravating factors from different victims and different crimes. The sentence on count two should reflect only the facts and aggravating factor related to Mr. Peterson's murder. It makes no sense to increase the sentence that was previously imposed on count two based on the fact that the aggravating factor on a separate crime, with a different victim, was vacated. Therefore, based on the record, the appropriate sentence on count two is the original sentence of 220 months plus an additional 72 months for the exceptional sentence (the original 80 months minus the improperly considered 10 percent added for good time). For these reasons, this court should reverse and remand the sentence on count two.

3. The Exceptional Sentence on Count Two Was Clearly Excessive.

The length of an exceptional sentence is reviewed for abuse of discretion. *State v. Oxborrow*, 106 Wash.2d 525, 530, 723 P.2d 1123 (1986). A "sentence is excessive only if its length, in light of the record, 'shocks the conscience.' " *State v. Vaughn*, 83 Wash.App. 669, 681, 924

P.2d 27 (1996) (citations omitted), *review denied*, 131 Wash.2d 1018, 936 P.2d 417 (1997). The maximum sentence should be reserved for worst case scenarios. *State v. Woody*, 48 Wn.App. 772, 778, 742 P.2d 133 (1987), *review denied*, 110 Wn.2d 1006 (1988).

In this case, as discussed above, the resentencing court improperly considered facts related to the vacated good Samaritan aggravator related to Mr. Miller's murder as a the basis for the length of the exceptional sentence on Mr. Peterson's murder. The original sentencing court deemed an exceptional sentence of 80 months appropriate for the deliberate cruelty to Mr. Peterson on count two. Increasing the exceptional sentence to 115 months, based solely on the fact that the aggravating factor on a separate crime, with a separate victim, was vacated, and where there was no mention of the injuries to Mr. Peterson or the reasons for an exceptional sentence related to the deliberate cruelty aggravator, is clearly excessive. Furthermore, a sentence of 600 months, or 50 years, is tantamount to a life sentence. The original sentencing court acknowledge that the sentence was tantamount to a life sentence, noting that Mr. Crow would be in his 80's when released, if he lived that long. (CP 190). While the sentence was reduced by 60 months, or five years, it is still tantamount to a life sentence.

4. This Court Should Not Impose Appellate Costs Because Mr. Crow is Indigent and Unable to Pay.

This Court has discretion on whether or not to impose appellate costs in a criminal case. *State v. Sinclair*, 192 Wash. App. 380, 389-90, 367 P.3d 612, 616 (2016); *see also* RAP 14.2[1], 14.1(c)[2].

> As a general matter, the imposition of costs against indigent defendants raises problems that are well documented in Blazina—e.g., "increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration." *Blazina*, 182 Wash.2d at 835, 344 P.3d 680. It is entirely appropriate for an appellate court to be mindful of these concerns. Carrying an obligation to pay [appellate costs] plus accumulated interest can be quite a millstone around the neck of an indigent offender.

Sinclair, 192 Wash. App. at 391-92, quoting *State v. Blazina*, 182 Wn.2d 827, 301 P.3d 492 344 P.3d 680, 686 (2015). Although *Blazina* is not binding for appellate costs, some of the same policy considerations apply. *Id.*

Under *Blazina*, a trial court must consider "important factors, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay." *Blazina*, 182 Wn.2d at 838. In

[1] "A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, *unless the appellate court directs otherwise in its decision terminating review.*" RAP 14.2 (emphasis added).
[2] "If the court determines costs in its opinion or order, a commissioner or clerk will award costs in accordance with that determination." RAP 14.1(c).

addition, if a person is considered indigent, "courts should seriously question that person's ability to pay . . . ." *Id.*

A trial court's finding of indigency will be respected unless there is good cause not to do so. *Sinclair*, 192 Wash. App. at 393; *see also* RAP 15.

In this case, Mr. Crow was found indigent and counsel was appointed for his trial, as well as this appeal. (CP 204-05). Non-mandatory legal financial obligations were waived by the trial court. (CP 209). Mr. Crow is serving a 600 month, or 50 year, prison sentence. (CP 210). Therefore, it is extremely unlikely that Mr. Crow will ever be able to pay appellate costs. Therefore, this Court should exercise its discretion and not award appellate costs in this matter, if Mr. Crow does not substantially prevail.

I. CONCLUSION

In conclusion, the resentencing court did not state the basis for the exceptional sentence, improperly considered facts related to the vacated good Samaritan aggravator as a basis for the exceptional sentence, and based on the facts of this case, the exceptional sentence on count two was clearly excessive. Therefore, the exceptional sentence on count two should be reversed and the matter remanded for resentencing.

Dated this 7th day of November, 2016.

Respectfully Submitted,

JENNIFER VICKERS FREEMAN
WSBA# 35612
Attorney for Appellant,
Tommy Lee Crow, Jr.

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, vs. TOMMY LEE CROW, JR, Appellant.	NO. 48859-1-II CERTIFICATE OF SERVICE

The undersigned certifies that on this day correct copies of this appellant's brief were delivered electronically to the following:

David C. Ponzoha, Clerk, Division II, Court of Appeals, 950 Broadway Street, Suite 300, Tacoma, WA 98402.

James C. Powers
Deputy Prosecuting Attorney
2000 Lakeridge Dr. SW Bldg 2
Olympia WA 98502
powersj@co.thurston.wa.us

The undersigned certifies that on this day correct copies of this appellant's brief were delivered by U.S. mail to the following:

Tommy Crow, Jr. DOC# 773446 (Appellant)
Clallam Bay Corr Center
1830 Eagle Crest Way
Clallam Bay WA 98326

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington.

Signed November 7, 2016 at Tacoma, Washington.

CERTIFICATE OF SERVICE

Pierce County Department of Assigned Counsel
949 Market Street, Suite 334
Tacoma, WA 98402
(253) 798-6996
(253)798-6715 (fax)

PIERCE COUNTY DEPARTMENT OF ASSIGNED COUNSEL

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powersj@co.thurston.wa.us
jfreem2@co.pierce.wa.us
mbenton@co.pierce.wa.us